HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 23 Public Meetings
SPONSOR(S): Rodrigues and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 50

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee		Stramski	Williamson
2) Rulemaking Oversight & Repeal Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

The State Constitution and the Florida Statutes set forth the state's public policy regarding access to government meetings; however, both are silent concerning whether citizens have a right to be heard at a public meeting. To date, Florida courts have heard two cases concerning whether a member of the public has a right to be heard at a meeting when he or she is not a party to the proceedings. Current case law provides that while Florida law requires meetings to be open to the public, it does not give the public the right to speak.

The bill requires members of the public to be given a reasonable opportunity to be heard on a proposition before a board or commission. However, the opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if certain requirements are met. The bill also provides that the opportunity to be heard is not required at certain meetings of a board or commission.

The bill authorizes a board or commission to adopt limited rules or policies: limiting the time an individual has to address the board of commission; requiring that representatives speak on behalf of groups or factions at meetings where large numbers of individuals wish to be heard; prescribing procedures by which an individual may inform a board of commission of a desire to be heard; and designating a period of time for public comment. It is presumed that a board or commission is acting in compliance with the act if the board or commission adopts rules or policies in compliance with the act and follows such rules or policies when providing an opportunity for the public to be heard.

The bill provides that the circuit courts have jurisdiction to issue injunctions for the purpose of enforcing this section upon the filing of an application for such injunction by any citizen of Florida. Whenever an action is filed against a board or commission to enforce the provisions of the act, the court must assess reasonable attorney's fees against the appropriate state agency or authority if the court determines that the defendant acted in violation of the act. The bill also authorizes the court to assess reasonable attorney's fees against the individual filing such an action if the court finds that the action was filed in bad faith or was frivolous.

The bill provides that any action taken by a board or commission that is found to be in violation of the act is not void as a result of such violation.

The bill could have a negative fiscal impact on state and local governments.

This bill may be a county or municipality mandate. *See* Section III.A.1. of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

State Constitution: Open Meetings

Article I, s. 24(b) of the State Constitution sets forth the state's public policy regarding access to government meetings. The section requires that all meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, be open and noticed to the public.

Article I, s. 24(c) of the State Constitution authorizes the Legislature to provide exemptions from the open meeting requirements upon a two-thirds vote of both legislative chambers, in a bill that specifies the public necessity giving rise to the exemption.

Government in the Sunshine Law

Public policy regarding access to government meetings also is addressed in the Florida Statutes. Section 286.011, F.S., also known as the "Government in the Sunshine Law" or "Sunshine Law," further requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, at which official acts are to be taken be open to the public at all times.[1] The board or commission must provide reasonable notice of all public meetings.[2] Public meetings may not be held at any location that discriminates on the basis of sex, age, race, creed, color, origin or economic status or which operates in a manner that unreasonably restricts the public's access to the facility.[3] Minutes of a public meeting must be promptly recorded and be open to public inspection.[4]

Right to Speak at Meetings

The State Constitution and the Florida Statutes are silent concerning whether citizens have a right to be heard at a public meeting. To date, Florida appellate courts have heard two cases directly addressing whether a member of the public has a right to be heard at a meeting when he or she is not a party to the proceedings.[5]

In *Keesler v. Community Maritime Park Associates, Inc.*[6], the plaintiffs sued the Community Maritime Park Associates, Inc., (CMPA) alleging that the CMPA violated the Sunshine Law by not providing the plaintiffs with the opportunity to speak at a meeting concerning the development of certain waterfront property. The plaintiffs argued that the phrase "open to the public" granted citizens the right to speak at

public meetings. The First District Court of Appeal held:

[1] Section 286.011(1), F.S.
[2] *Id.*
[3] Section 286.011(6), F.S.
[4] Section 286.011(2), F.S.
[5] Florida courts have heard numerous cases regarding Sunshine Law violations; however, only two appear to be on point regarding the public's right to speak at a public meeting. Other cases have merely opined that the public has an inalienable right to be present and to be heard. The courts have opined that "boards should not be allowed, through devious methods, to 'deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.'" *See, for example, Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 699 (Fla. 1969) ("specified boards and commissions … should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made"); *Krause v. Reno*, 366 So.2d 1244, 1250 (Fla. 3rd DCA 1979) ("citizen input factor" is an important aspect of public meetings); *Homestead-Miami Speedway, LLC v. City of Miami*, 828 So.2d 411 (Fla. 3rd DCA 2002) (city did not violate Sunshine Law when there was public participation and debate in some but not all meetings regarding a proposed contract).
[6] 32 So.3d 659 (Fla. 1st DCA 2010).

> [A]lthough the Sunshine Law requires that meetings be open to the public, the law does not give the public the right to speak at the meetings. Appellants have failed to point to any case construing the phrase "open to the public" to grant the public the right to speak, and in light of the clear and unambiguous language in *Marston*[7] (albeit dicta), we are not inclined to broadly construe the phrase as granting such a right here.[8]

The second case, *Kennedy v. St. Johns Water Management District*[9], was argued before the Fifth District Court of Appeal on October 13, 2011. At a meeting of the St. Johns Water Management District (District), the overflow crowd was put in other rooms and provided a video feed of the meeting. Additionally, the District limited participation in the meeting by members of a group called "The St. Johns Riverkeeper." Only the St. Johns Riverkeeper representative and attorney were allowed to address the District board. Mr. Kennedy, who wanted to participate in the discussion, sued arguing that the Sunshine Law requires that citizens be given the opportunity to be heard. Mr. Kennedy also alleged that the District violated the Sunshine Law by failing to have a large enough facility to allow all who were interested in attending the meeting to be present in the meeting room. On October 25, 2011, the Fifth District Court of Appeal affirmed the trial court's ruling that the District did not violate the Sunshine Law as alleged.

Effect of the Bill

The bill creates a new section of law governing the opportunity for the public to be heard at public meetings of a board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision (board or commission). It requires members of the public to be given a reasonable opportunity to be heard on a proposition before a board or commission. However, the opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if the opportunity:

- Occurs at a meeting that meets the same notice requirements as the meeting at which the board or commission will take official action on the item;
- Occurs at a meeting that is during the decisionmaking process; and
- Is within reasonable proximity before the meeting at which the board or commission takes the official action.

It is unclear what is meant by the terms "proposition" and "reasonable proximity" because the terms are not defined.

The opportunity to be heard is not required for purposes of meetings that are exempt from open meeting requirements. In addition, the opportunity to be heard is not required when a board or commission is considering:

- An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, when compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act;
- An official act involving no more than a ministerial act; or
- A meeting in which the board or commission is acting in a quasi-judicial capacity with respect to the rights or interests of a person, except as otherwise provided by law.

It is unclear what is considered an "unreasonable delay" when deciding if the public's opportunity to be heard should be curtailed.

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[7] In *Wood v Marston*, the Florida Supreme Court held that the University of Florida improperly closed meetings of a committee charged with soliciting and screening applicants for the deanship of the college of law. However, the *Marston* court noted "nothing in this decision gives the public the right to be more than spectators. The public has no authority to participate in or to interfere with the decision-making process." *Wood v. Marston*, 442 So.2d 934, 941 (Fla. 1983).

[8] *Keesler* at 660-661.

[9] *Kennedy v. St. Johns River Water Management District*, No. 2009-0441-CA (Fla. 7th Cir. Ct. 2010), *per curiam affirmed* 84 So.3d 331 (Fla. 5th DCA 2011).

If the board or commission adopts rules or policies to govern the opportunity to be heard, then those rules or policies must be limited to those that:

- Limit the time that an individual has to address the board or commission;
- Require, at meetings in which a large number of individuals wish to be heard, that a representative of a group or faction on an item, rather than all of the members of the group or faction, address the board or commission;
- Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard, to indicate his or her support, opposition, or neutrality on a proposition, and to indicate his or her designation of a representative to speak for him or her or his or her group on a proposition if he or she so chooses; or
- Designate a specified period of time for public comment.

The bill authorizes the adoption of rules or policies that require representatives of factions or groups to address the board, but does not specifically address the manner of selecting such representatives. Neither does the bill define factions or groups.

It is presumed that the board or commission is acting in compliance with the act if the board or commission adopts rules or policies in compliance with the act and follows such rules or policies when providing an opportunity to be heard.

The bill provides that the circuit courts have jurisdiction to issue injunctions for the purpose of enforcing this section upon the filing of an application for such injunction by any citizen of Florida. Whenever an action is filed against a board or commission to enforce the provisions of this act, the court must assess reasonable attorney fees against the appropriate state agency or authority if the court determines that the defendant to such action acted in violation of the act. The bill also authorizes the court to assess reasonable attorney fees against the individual filing such an action if the court finds that the action was filed in bad faith or was frivolous. These provisions do not apply to a state attorney or his or her duly authorized assistants or any officer charged with enforcing the provisions of the act.

The bill provides that any action taken by a board or commission that is found to be in violation of the act is not void as a result of such violation.

B. SECTION DIRECTORY:

Section 1 creates s. 286.0114, F.S., providing that the public be provided with a reasonable opportunity to be heard at public meetings.

Section 2 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   See FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Governmental entities could incur additional meeting related expenses because longer and more frequent meetings could be required when considering items of great public interest. As a result, it is likely staff would have to be compensated, security would have to be provided, and other expenses related to the meeting and meeting facility would be incurred. The amount of those potential expenses is indeterminate and would vary depending on the magnitude of each issue and the specific associated meeting requirements.

In addition, the uncertainties in the bill could generate lawsuits over its meaning and application to particular situations. The cost of defending such suits would be indeterminate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision of Art. VII, s. 18 of the State Constitution may apply because this bill could cause counties and municipalities to incur additional expenses associated with longer meetings or increased meetings due to the new requirement that the public be provided with the opportunity to speak at such meetings; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments. The exceptions to the mandates provision of Art. VII, s. 18, of the Florida Constitution appear to be inapplicable because the bill does not articulate a threshold finding of serving an important state interest.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes a board or commission to adopt limited rules or policies governing the opportunity to be heard. The limited rules or policies may require, at meetings in which a large number of individuals wish to be heard, that representatives of groups or factions on an item, rather than all of the members of the groups or actions, address the board or commission. It requires representatives of factions or groups to address the board, but does not directly address the manner of selecting such representatives.

The bill might result in the same statutory provisions of s. 286.0114, F.S., being variously interpreted through rulemaking by multiple boards or commissions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues: Placement in Law

The bill creates s. 286.0114, F.S., to provide provisions governing the opportunity for the public to be heard at a public meeting of a board or commission. It is suggested that the provisions be created in s. 286.0110, F.S., in order to ensure that the provisions are placed in law behind the Sunshine Law. As currently drafted, the opportunity to speak provisions would be placed in law behind exemptions to the Sunshine Law.

Drafting Issues: Board or Commission

The reasonable opportunity to be heard provision in proposed s. 286.0114(1), F.S., applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision". The remaining provisions of s. 286.0114, F.S., only name boards and commissions. This is not wholly consistent with s. 286.011, F.S., where every subsection specifies at least that it applies to any "board or commission of any such state agency or authority"[10], and in many cases is even more specific by stating that it applies "to any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision".[11] This inconsistency could be remedied if one uniform definition of "board or commission" was created and applied throughout proposed s. 286.0114, F.S.

Other Comments: Presumption of Compliance

Proposed s. 286.0114(4)(a), F.S., provides that if a board or commission adopts rules or policies in compliance with s. 286.0114, F.S., and acts in compliance with those rules, a board or commission will be presumed to be acting in accordance with s. 286.0114, F.S. It is unclear that this provision provides any substantive protection to boards or commissions. In order for the presumption to apply, it would first have to be found that rules or policies adopted and followed by a board or commission are in compliance with s. 286.0114, F.S. If a board or commission adopts rules pursuant to the act and acts in compliance with those rules, compliance with the act should be established, not merely presumed.

Other Comments: Remedies

The bill provides that a person may seek injunctive relief to enforce the right to a reasonable opportunity to be heard. However, the bill also provides that any act taken by a board or commission in violation of the bill is not void. A challenge brought by a person who alleges that he or she was not provided a reasonable opportunity to be heard before a board or commission about a proposition may be rendered moot if the board or commission has taken a final action on the proposition. Moot matters are generally not considered by courts. Injunctive relief, for example, might not be available in such a scenario as there would be no action of the board or commission that could be enjoined.[12] Declaratory relief may likewise be unavailable.[13] On the other hand, there is a generally recognized exception to the rule of mootness where a matter is capable of repetition and evading review. Where a harm is capable of recurring, courts may consider a case even though the specifics of that particular case may render it moot.[14]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[10] Section 286.011(2), F.S.

[11] Sections 286.011(1), 286.011(4), 286.011(5), 286.011(7), 286.011(8), F.S.

[12] *See, for example, Chafetz v. Greene*, 203 So.2d 18 (Fla. 3rd DCA 1967) (dismissing a suit seeking to enjoin an election as moot since the election had been held); *Halloran v. Pensacola Ass'n of Life Underwriters, Inc.*, 395 So.2d 554 (Fla. 1st DCA 1981) (dismissing as moot a suit seeking to enjoin a temporary suspension where the suspension had expired).

[13] *See Boatman v. Florida Dep't of Corrections*, 924 So.2d 906 (Fla. 1st DCA 2008) (finding that portion of complaint dealing with conditions for which an inmate sought declaratory and injunctive relief were rendered moot by the inmate's transfer).

[14] *See Gangloff v. Taylor*, 758 So.2d 1159 (Fla. 4th DCA 2000) (holding that action challenging a homeowner's association's assessments was not rendered moot by a change in the method of levying assessments as there was no guarantee that future boards would not attempt to reinstate the old method of levying assessments); *Z.R. v. State*, 596 So.2d 723 (Fla. 5th DCA 1992) (stating that a challenge to detention without an adjudicatory hearing in violation of statute could proceed even after the detention had terminated, as illegal detentions might otherwise be capable of repetition yet evading judicial review).